IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

THURSDAY, THE 23RD AUGUST 2007 / 1ST BHADRA 1929

WP(C).No. 35427 of 2005(P)

PETITIONERS:

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1. **M.U.PRABHAN, S/O.UNTAMAN,**
   MURIYATH VEEDU, 34/2517, MAMANGALAM,
   KOCHI-682 025.

2. **M.U.GOPI, S/O.UNTAMAN, OF DO.DO.**

3. **M.U.SASHI, S/O.UNTAMAN, OF DO.DO.**

BY ADV. SRI.M.GOPIKRISHNAN NAMBIAR.

RESPONDENTS:

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1. **RATNAVALLAY, W/O.VIVEKANANDAN,**
   MOTHOLIL VEETTIL, ALUVA TALUK,
   CHELAMATTOM VILLAGE, ERNAKULAM DISTRICT.

2. **SATHI, W/O.GOPI,**
   ORAVANTHURUTHIL VEETTIL,
   VALIYAPAZHAMPILLYTHURUTHU KARAYIL,
   PARAVOOR TALUK, CHENDAMANGALM VILLAGE,
   ERNAKULAM DISTRICT.

3. **LALITHA, W/O.RAMESAN, VALAPARAMBIL,**
   KARUMALLOOR KARAYIL, PARAVOOR TALUK,
   KARUMALLOOR VILLAGE, ERNAKULAM DISTRICT.

4. **LATHA, W/O.RAJAN,**
   KOCHUKOTTAPURATH, KADAVECHOOR DESOM,
   VAIKOM TALUK, VECHOOR VILLAGE.

W.P.(C). NO.35427/2005:

5. KUTTIKRISHNAN, S/O.UNTAMAN,
MURIYATH VEEDU, B.T.S.ROAD,
EDAPPALLY, KOCHI-682 024.

BY ADV. SRI.DINESH R.SHENOY.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C). NO.35427/2005:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P.1: COPY OF THE I.A. 5296/2005 IN O.S. 244/2003, FILED BY THE PETITIONERS BEFORE THE SUB COURT, ERNAKULAM.

EXT.P.2: COPY OF THE I.A. 5300/2005 IN O.S. 244/2003 FILED BY THE PETITIONERS BEFORE THE SUB COURT, ERNAKULAM.

EXT.P.3: COPY OF THE ORDER DTD. 08/12/2005 IN I.A. NOS. 5296/2005 AND I.A. 5300/2005, SUB COURT, ERNAKULAM.

RESPONDENT'S EXHIBITS: NIL.

//TRUE COPY//

prv.

PIUS C. KURIAKOSE, J.

W.P.(C) No. 35427 OF 2005

Dated this the 23rd day of August, 2007

JUDGMENT

Ext.P3 common order, passed by the Principal Subordinate Judge, Ernakulam in IA Nos. 5296 and 5300 of 2005, is under challenge in this Writ Petition initiated by defendants 3 to 5 in the suit which is one for partition and separate possession of their shares in the plaint schedule property since they along with the petitioners are legal heirs of their parents including Smt.Karthiyani, mother, who was the owner of the plaint B schedule property. The petitioners resisted the suit contending that Smt.Karthiyani had executed a Will on 16.02.93 bequeathing her rights over the properties in favour of the petitioners. It was accordingly contended that, the properties covered by the Will are not available for partition.

2. After the filing of the written statement, respondents 1 to 4 and others filed a fresh suit OS No. 56 of 2004 seeking for a declaration that the Will relied on by them is void and not binding on the plaintiffs and also for consequential injunction. Learned Subordinate Judge ordered joint trial. The 2nd plaintiff in OS No.244 of 2003 was examined on commission as PW1. Another witness on the side of the plaintiff was PW2. One more witness is to be examined on the side of the plaintiff.

At that juncture counsel who was appearing for the petitioner relinquished the vakalath and the petitioner became obliged to engage another counsel. The fresh counsel so engaged, on going through the records found that certain vital points were omitted to be asked during the cross examination of PW1. Accordingly, IA No.5296 of 2005 for recalling PW1 and allowing further examination of PW1 was examined. Ext.P1 is copy of IA No.5296 of 2005. IA No.5300 of 2005 was also filed for removing the case from the special list so as to enable the fresh counsel to study the brief. Ext.P2 is copy of that IA. The learned Subordinate Judge dismissed Ext.P1 IA mainly on the ground that Order XVIII Rule 17 invoked by the petitioners was not an enabling provision allowing parties in the suit to recall and examine the witness already examined and also on the reason that the fresh counsel was not willing to divulge to the court the aspects which had been omitted to be cross examined. IA No.5300 of 2005 was dismissed on the reason that the counsel has, obviously, by that time obtained enough time for preparing the brief.

3. I have heard the submissions of Sri.P.Suresh, learned counsel for the petitioners and also those of Sri.Dinesh R.Shenoy, counsel for the contesting respondents. Sri.Suresh took me through the full text of the impugned order and would highlight the discussions of the learned

Subordinate Judge in so far as they pertain to IA No.5296 of 2005. On reading between the lines in the order, it is clear to my mind that the learned Subordinate Judge was to a certain extent provoked by the attitude of the learned counsel that he was not in a position to divulge the questions which are intended to be asked in cross examination, once the witness was re-called. Mr.Suresh's submission before me was that in the nature of the issues which were being tried, questions necessarily had to be asked regarding the testamentary capacity of the testator, Smt.Karthyani, which was very much under challenge by the respondents-plaintiffs. Counsel submitted that it may became necessary to confront the witness with certain documents which may show that the case of the respondents that the testator was completely bed ridden and hence incapacitated from executing the Will is absolutely in correct. The witness sought to be recalled was intelligent enough to discern the purport of all questions if divulged in the open court. This was why Mr.Suresh was diffident to divulge even to the learned Judge in the presence of the witness and his counsel as to the nature of the questions which he proposed to put to the witness. According to Mr.Suresh, divulging the questions in advance would defeat the purpose of the questions. Mr.Suresh would fairly concede before me that Order XVIII Rule 17 CPC was not the proper provision governing the situation

on hand and that the view of the learned Subordinate Judge in that regard expressed in the order is correct. Mr.Suresh submitted that the inherent powers of the court which are seen saved as per Section 151 are intended for providing or rendering justice in circumstances not specifically provided for by the Code. My attention was drawn by Mr.Suresh to judgment of this Court in **Savithri v. Sreenivasan** 1987(2) KLT 388. This was a fit case in the learned counsel's opinion where the application, IA N0.5296 of 2005 should have been allowed, even if it be by imposing terms for the inconvenience caused to the Court and to the opposite side.

4. Sri.Dinesh R.Shenoy would resist all the submissions of Mr.Suresh and would justify the impugned orders particularly to the extent it pertains to IA No.5296 of 2005.

5. I have considered the rival submissions. S.Padmanabhan, J. in **Savithir**i's case(supra) has observed at paragraph 6 of the judgment as follows:

> "6. The argument based on the decision in *M.M. Amonkar v. S.A. Johari* [1984 (2) SCC 354] that the affidavit in support of the application under Order XVIII Rule 17 is vague does not appear sound. Vagueness is in the same sense that the plaintiff who filed the affidavit did not say what exactly the mistake in recording of

the deposition is. Plaintiff cannot be expected to know and specify the exact mistake which is more within the knowledge of the witness. Further it is not proper for the plaintiff to specify the mistake because such a version is likely to affect the evidence of the witness when recalled and questioned."

6. The learned Subordinate Judge in the impugned order himself has indicated that there may be inherent powers with the Court to grant the prayer. But, it appears that, the learned Judge was of the view that inherent power is not to be invoked in favour of a party who is not inclined to take the Court into confidence and divulge the necessary details sought for by the Court regarding the proposed questions in cross examination after recalling. I will be able to agree with the learned Subordinate Judge in his view that inherent powers saved under Section 151 of the Code are not to be invoked in each and every situation irrespective of the conduct of the parties. But explanation offered by Mr.P.Suresh before me for the diffidence expressed by him in the matter of divulging the proposed questions in open court is plausible at least to a certain extent.

7. I set aside the impugned order to the extent it pertains to IA No.5692 of 2005 and allow IA No.5296 of 2005 on condition that the petitioner pays a sum of Rs.500/- by way of cost to the contesting

repondent and a like sum to the Ernakulam District Legal Services Authority within a period of three weeks of receiving copy of this judgment.

As for the order in IA No.5300 of 2005, the learned Judge was certainly justified in his view that the fresh advocate got enough time already for preparing the brief. However, since the order in IA No.5296 of 2005 is set aside and that IA is being allowed on conditions, I direct the learned Subordinate Judge to re-list the suit for trial in the earliest available special list (after ensuring that the cost imposed is paid by the petitioner on time) and dispose of the suit without delay.

PIUS C. KURIAKOSE, JUDGE

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